Nos. 02-1238, 02-1386, 02-1405

Supreme Court, U.S.
FILED
OCT 24 2003
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JEREMIAH W. (JAY) NIXON,
Attorney General of Missouri,

Petitioner,

v.

MISSOURI MUNICIPAL LEAGUE, et al.,

Respondents.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES,

Petitioners,

v.

MISSOURI MUNICIPAL LEAGUE, et al.,

Respondents.

SOUTHWESTERN BELL TELEPHONE, L.P.,
fka Southwestern Bell Telephone Company,

Petitioner,

v.

MISSOURI MUNICIPAL LEAGUE, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF AMICUS CURIAE OF THE VIRGINIA LOCALITIES IN SUPPORT OF RESPONDENTS

STEVEN R. MINOR
ELLIOTT LAWSON & POMRENKE
P.O. Box 8400
Bristol, Virginia 24203
Tel: (276) 466-8400
Fax: (276) 466-8161

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
INTEREST OF THE VIRGINIA LOCALITIES AS AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
1. Allowing local governments to provide telecommunications serves the purposes of the 1996 Act without unfairness to private industry or the public.	3
2. In Virginia, some localities would be unserved or underserved unless local governments are considered "entities" that can provide telecommunications services	7
3. Freed from the barrier-to-entry statute, local governments in Virginia are bringing competition and advanced services to parts of Virginia where the private industry has failed to act.	14
4. The differences between government service providers and private companies support the conclusion that all kinds of "entities" including local government are necessary to achieve the competition and services that Congress intended	18
CONCLUSION	21

TABLE OF AUTHORITIES

Page

CASES

Cablevision of Boston, Inc. v. Public Improvement Com'n of City of Boston, 184 F.3d 88 (1st Cir. 1999) 4

City of Bristol v. Earley, 145 F. Supp. 2d 741 (W.D. Va. 2001) 1, 7, 12

Communications Telesystems Intern. v. California Public Utility Com'n, 196 F.3d 1011 (9th Cir. 1999) 4

GTE South, Inc. v. Morrison, 199 F.3d 733 (4th Cir. 1999) 3

In re Missouri Municipal League, 16 F.C.C.R. 1,157 (2001), *vacated on other grounds*, 299 F.3d 949 (8th Cir. 2002) 6

In re TCI Cablevision, 12 F.C.C.R. 21,396 (1997) 4

In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 F.C.C.R. 15,499 (1996) 3

In the Matter of the Public Utility Commission of Texas, 13 F.C.C.R. 3,460 (1997), *petition for review denied*, 164 F.3d 49 (D.C. Cir. 1999) 7

TCG New York, Inc. v. City of White Plains, N.Y., 125 F. Supp. 2d 81 (S.D.N.Y. 2000) 4

FEDERAL STATUTES

47 U.S.C. § 253 ..... 3, 4, 12

47 U.S.C. § 254 4

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

STATE STATUTES

1998 Va. Acts of Assembly, Chap. 906 11

1999 Va. Acts of Assembly, Chap. 916 11

2002 Va. Acts of Assembly, Chap. 479 12

Va. Code § 15.2-1500 ..... 11, 13

Va. Code § 15.2-2160 13

Va. Code § 56-484.12 11

OTHER SOURCES

About BVU Optinet, *at* http://www.bvu-optinet.com/about.htm 14

Associated Press, *Technology Boom Reaches Virginia County*, (Mar. 31, 2003), *available at* http://www.govtech.net/news/news.phtml?docid=2003.03.31-45307 17

Blacksburg Electronic Village, *at* http://www.bev.net 10

Caron Carlson, *Rural Areas to Get Broadband*, eWeek (June 2, 2003), *at* http://www.eweek.com/article2/0,3959,1114842,00.asp 16

Center for Innovative Technology, Final Report HJ163, *Advancing Affordable, High-Bandwidth Electronic Networks in Rural Virginia* (Nov. 30, 2002), *at* http://www.technology.virginia.gov/SecInfo/legReports/finalReportHJ163_021212.doc 14

John DeWitt, *The Battle Over Broadband*, American City & County, Apr. 1, 2003, http://www.ecorridors.vt.edu/news/topic/policy/broadbandbattle.shtml 17

TABLE OF AUTHORITIES – Continued

Page

Greg Edwards, *Gilmore Offers Tech Plan 'Digital Dominion' Would Unify Approach*, Richmond Times-Dispatch, Sept. 1, 2000 12

Greg Edwards, *Utility Lobbyists Prevail Bill Says Localities Can't Offer Services to Residents, Firms*, Richmond Times-Dispatch, Mar. 14, 1998 (quoting Del. Stump) 11

Electronic Village of Abingdon, at http://www.eva.org 10

Amy Gatley, *Officials: Southwest Virginia's future prosperity dependent upon technology, education and tourism*, Kingsport Times-News, Dec. 6, 2000 9

House Doc. No. 28, Rural Virginia Prosperity Commission, *From the Grassroots: Final Report of the Rural Virginia Prosperity Commission* (Dec. 1, 2001), http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/HD282002/$file/hd28_2002.pdf 9

http://www.scarborough.com/scarb2002/press/pr_broadchart.htm (last visited Oct. 9, 2003) 15

Mary Jander, *Grass Roots Fiber Booms*, Light Reading (Oct. 6, 2003), http://www.lightreading.com/document.asp?site=lightreading&doc_id=41363 15

Del. Steven Landes, quoted in *Private and Public Sector Efforts Bolster Broadband Activities Across the Commonwealth, at* http://www.vectec.org/media/news/broadband.html (last visited Oct. 17, 2003) 9

TABLE OF AUTHORITIES – Continued

Page

Jeff Lester, *Lenowisco Hires Broadband Manager*, Coalfield Progress, Oct. 8, 2003, *available at* http://www.zwire.com/site/news.cfm?newsid=10285473&BRD=1283&PAG=461&dept_id=158544&rfi=8 16

Memorandum of the Honorable William Wampler, Jr., in *Marcus Cable Associates, LLC v. City of Bristol*, Civil Action No. 1:02cv00197 (U.S. District Court for the Western District of Virginia, Dec. 9, 2002) 13

Minutes of Bristol Tennessee City Council Meeting (Nov. 5, 2002), *at* http://www.bristoltn.org/Agendas/NOV502~1.doc 18

Brenda Neideigh, *What Should be the Public Role in the Development of Advanced Network Infrastructure? An Analysis of Commonwealth of Virginia Restrictions on Municipal Telecommunications*, e-Corridors Working Paper #1 (Jan. 2001), *at* http://www.ecorridors.vt.edu/papers/topic/policy/ec.wp1.pdf 11

Charles Owens, *'Fiber-optic backbone' will revolutionize Tazewell, Russell economies*, Bluefield Daily-Telegraph, June 4, 2003, *at* http://www.zwire.com/site/news.cfm?newsid=8206343&BRD=2088&PAG=461&dept_id=346229&rfi=8 16

John Peters, *Rebuilding Danville: Job retraining and research capacity keep this mill town ahead*, Virginia Business, Apr. 2003 17

Victor Reklaitis, *Council*, Danville Register & Bee, Sept. 30, 2003 17

TABLE OF AUTHORITIES – Continued

Page

Statement of Chairman Michael Powell, *Re: Inquiry Regarding Carrier Current Systems, including Broadband over Power Line Systems*, ET Docket No. 03-XXX *at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-233537A2.pdf 15

Pamela Stallsmith, *Veteran Lobbyist Kept Up the Pace*, Richmond Times-Dispatch, Mar. 22, 1998 11

Kathy Still, *Dickenson County Goes Wireless*, Bristol Herald-Courier, Oct. 14, 2003, *available at* http://www.bristolnews.com/servlet/Satellite?pagename=TRI%2FMGArticle%2FTRI_BasicArticle&c=MGArticle&cid=1031771538662&path=/news/localnews&s=1054237353277 17

Mike Still, *BVU, planning districts get $4.75 million boost to broadband efforts*, Bristol Herald-Courier, Aug. 5, 2003, *at* http://www.bristolnews.com/servlet/Satellite?pagename=TRI%2FMGArticle%2FTRI_BasicArticle&c=MGArticle&cid=1031770358101&path=/frontpage 16

Mike Still, *Consultant: BVU's OptiNet Plan on Track*, Bristol Herald-Courier, Aug. 26, 2003, *available at* http://www.bristolnews.com/servlet/Satellite?pagename=TRI%2FMGArticle%2FTRI_BasicArticle&c=MGArticle&cid=1031770691994&path=/news/localnews&s=1054237353277 15

Virginia State Corporation Commission Docket No. PUC-2002-00231 5

The Virginia Tobacco Indemnification and Community Revitalization Commission, *at* http://www.vatobaccocommission.org/ 16

INTEREST OF THE VIRGINIA LOCALITIES AS AMICI CURIAE

The Virginia localities joining in this brief, as represented individually or by their association – the Towns of Abingdon, Front Royal, and Richlands, and the Cities of Bedford, Bristol, Danville, Martinsville, Radford, and Salem, and the Virginia Municipal Electric Association No. 1[1] – are towns and cities in Virginia with local electric systems or local telecommunications networks, or both. As in Missouri, the localities in Virginia have experienced life under an explicit barrier-to-entry statute. Some Virginia cities and towns, notably Abingdon, had municipal projects before the legislature passed the barrier-to-entry law.

As in Missouri, the Virginia barrier-to-entry was rejected in court – in the case of *City of Bristol v. Earley*. Following the federal court decision in *Earley*, the Virginia General Assembly changed the law, to allow local governments in some circumstances to provide telecommunications services. These local governments are enjoying the benefits which Congress intended in passing the Telecommunications Act of 1996 – some have begun offering telecommunications services, some have experimented

---

[1] The parties have consented to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the Amici Curiae – the Virginia Towns of Abingdon, Front Royal, and Richlands, the Cities of Bedford, Bristol, Danville, Martinsville, Radford, and Salem, and the members of Virginia Municipal Electric Association No. 1 – made a monetary contribution to the preparation and submission of this brief. The Virginia Municipal Electric Association No. 1 is made up of the Towns of Blackstone, Culpeper, Elkton and Wakefield and the Cities of Franklin, Harrisonburg and Manassas.

with pilot projects, and all have benefited from an improved competitive position by the mere possibility that they will provide telecommunications services, which gives these cities and towns leverage in dealing with private service providers. To explain to the Court how the repeal of the barrier-to-entry statute in Virginia is allowing local governments to act in ways that further the purposes of the 1996 Telecommunications, the Virginia localities submit this amicus brief.

SUMMARY OF ARGUMENT

The intent of Congress in passing the 1996 Telecommunications Act was to hasten the time when consumers and businesses all over the country realized the benefits of advanced services and competition in telecommunications. In rural areas, like many parts of Virginia, and sometimes even in the suburbs, shareholder-owned service providers have not found it in their interests to bring advanced services or to compete with established providers. To meet the goals of the Telecommunications Act, the "entities" that will provide services must include local governments. The experience of local government in Virginia, where a barrier-to-entry statute was lifted after the federal court determined it was preempted, shows how allowing local governments the opportunity to provide telecommunications serves the purposes of the Telecommunications Act.

1. Allowing local governments to provide telecommunications serves the purposes of the 1996 Act without unfairness to private industry or the public.

The Telecommunications Act of 1996 is a comprehensive rewriting of the Communications Act of 1934 that "fundamentally changes telecommunications regulation." *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15,499, ¶ 1 (1996). The broad purposes of the 1996 Act are "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Pub. L. No. 104-104, 110 Stat. 56, 56 (1996) (purpose statement). "Congress intended that competition under the Telecommunications Act take root 'as quickly as possible.'" *GTE South, Inc. v. Morrison*, 199 F.3d 733, 744 (4th Cir. 1999).

The monopolies that were the specific target of the 1996 Act were those of the incumbent local exchange carriers, such as Verizon, Sprint, and Southwestern Bell. These companies have every incentive to fight the competitive vision of the 1996 Act in every way that they can, and their positions stated before this Court in this litigation are but one way in which they are doing just that. Even so, the 1996 Act does not leave the incumbents, their competitors, or consumers unprotected against the depredations of unfair competition.

Section 253 of the 1996 Act prohibits barriers to entry, but allows the states to continue to regulate telecommunications services in accordance with section 253(b), which provides: "Nothing in this section shall affect the ability of

a State to impose, on a competitively neutral basis and consistent with section 254 of this section, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." 47 U.S.C. § 253(b). The 1996 Act "was designed to prevent explicit prohibitions on entry by a utility into telecommunications, and thereby to protect competition in the industry while allowing states to regulate to protect consumers against unfair business practices such as slamming." *Communications Telesystems Intern. v. California Public Utility Com'n*, 196 F.3d 1011, 1017 (9th Cir. 1999). In crafting section 253, Congress "recognized the continuing need for state and local governments to regulate telecommunications providers on grounds such as consumer protection and public safety, which are separate from any intent to create or maintain barriers to entry. Thus, it carved out safe harbors for these types of regulations." *Cablevision of Boston, Inc. v. Public Improvement Com'n of City of Boston*, 184 F.3d 88, 98 (1st Cir. 1999). Section 253(b) "preserves the ability of a state to regulate telecommunications on the basis of the 'public good.'" *TCG New York, Inc. v. City of White Plains, N.Y.*, 125 F. Supp.2d 81, 87 (S.D.N.Y. 2000); *see generally In re TCI Cablevision*, 12 F.C.C.R. 21,396, ¶ 107 (1997) ("Congress sought to strike a balance in the 1996 Act . . . [and] recognized the need for State and local governments to continue [*sic*] respond to truly local issues").

The "level-playing field" requirements of the 1996 Telecommunications Act were not intended to protect the monopolies of the incumbents. Incumbent carriers are protected, first and foremost, by their market share and resources as former monopolists. Incumbent carriers need

no protection from local government competition, yet they make use of state law level-playing requirements as an opportunity to thwart competition through litigation. When Sprint, for example, complains about how it has labored through the process for the City of Bristol to get its tariff to provide telephone service under the new rules of the State Corporation Commission, *see* Sprint Brief at 23-24, much of the difficulty and complication has resulted primarily from Sprint's own repeated requests for information and for injunctive relief. Sprint sought an administrative injunction against the City of Bristol before Bristol began its first day of providing service, and has been litigating with Bristol for information ever since. *See* Virginia State Corporation Commission Docket No. PUC-2002-00231 (petition filed by Sprint for a "Declaratory Judgment Interpreting Various Sections of Code of VA, for Injunction Prohibiting the City of Bristol from Providing Telecommunications Services in Violation of State Law and for Other Relief").[2]

Missing from the briefs of the appellants and their amici is any attempt to explain why local governments would ever want to get into the business of providing telecommunications services. It is expensive, the technology keeps changing, and the telephone companies and cable companies have the political and financial means and incentive to attack any form of competition. The answer, unfortunately, is that local governments step in to provide services and competition primarily when private industry does not. As with the other utility services provided by some of the Virginia localities – electricity, water,

[2] The docket entries are retrievable from the website of the Virginia State Corporation Commission, http://www.state.va.us/scc.

and sewer – telecommunications has become too important for unserved or underserved consumers to wait for the privilege of buying from a private service provider. Without the threat of competition from local governments, incumbent carriers in rural areas have no incentive to bring the best prices and the best technology to serve the rural customers.

For this very reason, the Commissioners of the Federal Communications Commission have specifically found in the Missouri case and earlier, that the provision of telecommunications services by local government furthers the purposes of the 1996 Act. *See In re Missouri Municipal League*, 16 F.C.C.R. 1157, ¶ 10 (2001), *vacated on other grounds*, 299 F.3d 949 (8th Cir. 2002) ("The Commission has found that municipally-owned utilities and other utilities have the potential to become major competitors in the telecommunications industry. In particular, we believe that the entry of municipally-owned utilities can further the goal of the 1996 Act to bring the benefits of competition to all Americans, particularly those who live in small or rural communities . . . municipally-owned utilities are well positioned to compete in rural areas, particularly for advanced telecommunications services, because they have facilities in place now that can support the provision of voice, video, and data services either by the utilities, themselves, or by other providers that can lease the facilities"); *id.*, 2001 WL 28068 at *1172 (separate statement of Chairman Kennard and Commissioner Tristani ("The right policy for consumers is to have as many providers of telecommunications from which to choose-barring entry by municipally-owned utilities does not give consumers that choice"); *id.*, 2001 WL 28068 at *1173 (separate statement of Commissioner Ness) ("municipal utilities

can serve as key players in the effort to bring competition to communities across the country, especially those in rural areas"); *see also In the Matter of the Public Utility Commission of Texas*, 13 F.C.C.R. 3,460, ¶ 190 (1997), *petition for review denied*, 164 F.3d 49 (D.C. Cir. 1999) ("we encourage states to avoid enacting absolute prohibitions on municipal entry into telecommunications. . . . Municipal entry can bring significant benefits by making additional facilities available for the provision of competitive services"). Thus, the issue, correctly understood, in evaluating the Eighth Circuit's decision, is whether local governments should be considered "entities" as to which the federal law prohibits barriers to entry, when they are often the only "entities" that are willing and able to provide the services and competition that are the fundamental purposes of the Act.

2. In Virginia, some localities would be unserved or underserved unless local governments are considered "entities" that can provide telecommunications services.

Facts about Virginia prove that the provision of telecommunications services by local government furthers the purposes of the 1996 Act. The telecommunications industry went boom and bust in Virginia without bringing advanced telecommunications to many parts of the state. Following on the U.S. District Court's decision in *City of Bristol v. Earley*, and the resulting changes in Virginia law, some Virginia localities are acting to bring new services to their communities. Even for those localities that decide not to spend public money on becoming more "wired," the threat of competition and the possibility that the government may some day provide services spurs the private sector to move forward in ways it might not otherwise have done.

Notwithstanding the changes in the federal telecommunications laws in the 1990s, in most Virginia towns and small cities there has been only the one local exchange provider for telephone service and one cable television provider. Even though Virginia has many thousands of miles of fiber-optic voice and data lines, there are many gaps in the availability of advanced services, even in some suburban areas like Manassas outside of Washington, D.C. Away from the cities, shareholder-owned companies have avoided expansion of their services because rural and less-densely populated areas are thought to be less profitable. Moreover, their monopolies in small communities allow these companies to maximize fees and minimize costs, where there is no competition, in order to subsidize their efforts to compete in other areas where they have no monopoly. The result has been to deny access to affordable advanced telecommunications services to areas of Virginia at the very time when changes in the economy have deprived those areas of the mainstays of the economy over the last 50+ years. In Virginia, coal, tobacco, textiles, furniture, peanuts, and the fishing industries are all on the wane, leaving localities in every corner of the state wondering how to stay viable for the future.

In its final report to the General Assembly, the Rural Virginia Prosperity Commission explained that "[b]ecause private investors can usually obtain higher rates of return from telecommunications infrastructure investments in larger urban centers, it is not evident when, or if, market

forces will cause private investors to meet the telecommunications infrastructure needs of rural Virginia. . . . "[3] In particular, the form of telecommunications services that new business need is high-bandwidth connections to the Internet, to allow transmissions of high volumes of data. The Commission was told that "[n]ot only is high-speed access needed for businesses and industrial prospects, it is also needed by residents wanting to keep pace with the world."[4] As one Commission member has declared, "Broadband is an integral part of economic development and if rural areas are going to keep up with their urban and suburban neighbors they must have access to broadband. It is critical for business opportunities, education systems and local governments."[5] Facing the reality that private telecommunications companies would not provide the services they required, some local governments in Virginia began considering whether they should provide services for themselves, as they have done for the needs of their residents in providing water, sewer, power, and other utility services.

The idea of local government networks as a solution for economic development was first studied at length at

---

[3] House Doc. No. 28, Rural Virginia Prosperity Commission, *From the Grassroots: Final Report of the Rural Virginia Prosperity Commission*, at p. 25 (Dec. 1, 2001), http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/HD282002/$file/hd28_2002.pdf.

[4] Amy Gatley, *Officials: Southwest Virginia's future prosperity dependent upon technology, education and tourism*, Kingsport Times-News, Dec. 6, 2000.

[5] Del. Steven Landes, quoted in *Private and Public Sector Efforts Bolster Broadband Activities Across the Commonwealth*, *at* http://www.vectec.org/media/news/broadband.html (last visited Oct. 17, 2003).

Virginia Tech, which worked with the Town of Blacksburg on what became the Blacksburg Electronic Village, or "BEV."[6] The Town of Abingdon, among others, picked up the idea of an "electronic" village, and installed a segment of fiber-optic cable down through the middle of town, allowing adjacent businesses and offices to hook up for cheap, high broadband connections to the Internet.[7] Lynchburg, Bedford, and Martinsville also pursued network projects of various kinds. The response of the telecommunications companies to what it saw happening with Lynchburg and Abingdon and elsewhere in Virginia was to convince the legislature to pass a new law explicitly barring local governments (other than Abingdon) from providing telecommunications services.

Regarding the City of Lynchburg's project, one researcher has explained:

> Upon learning of the success of the Lynchburg network build-out, the local telecom provider lobbied the state legislature to prevent local governments from operating telecommunications services and leasing of network capacities to any commercial organization or the public. As a result of these lobbying activities, several bills were considered in the 1998 legislative sessions in the Virginia legislature. Lynchburg, in coalition with other smaller cities, led an aggressively fought, but eventually lost, battle in the legislature against the large telcos and the cable industry that aimed to

---

[6] *See generally Blacksburg Electronic Village, at* http://www.bev.net.

[7] *See generally Electronic Village of Abingdon, at* http://www.eva.org.

secure municipalities' right to offer telecommunications services.[8]

When this barrier-to-entry law was passed, rural Virginia expressed their concerns that "they won't get high-speed communications services unless they provide for themselves."[9] Their local governments argued before the legislature that "they need the ability to build fiber-optic lines and offer high-speed Internet services to promote economic development in the absence of the telephone industry being able to do it."[10]

The new law was 1998 Va. Acts of Assembly, Chap. 906, which added new language to Va. Code § 15.2-1500 prohibiting local governments from selling telecommunications services. Originally, the prohibition was to expire in the year 2000. In 1999, the Virginia telecommunications industry persuaded the legislature to remove the expiration date, in return for an industry-crafted "exception" to the general prohibition, that would allow localities to lease only "dark fiber" in certain conditions. 1999 Va. Acts of Assembly, Chap. 916 (amending Va. Code § 15.2-1500 and adding Va. Code § 56-484.12). In reality, as a federal district court subsequently found, the limitations imposed

---

[8] Brenda Neideigh, *What Should be the Public Role in the Development of Advanced Network Infrastructure? An Analysis of Commonwealth of Virginia Restrictions on Municipal Telecommunications*, e-Corridors Working Paper #1 (Jan. 2001), *at* http://www.ecorridors.vt.edu/papers/topic/policy/ec.wp1.pdf.

[9] Greg Edwards, *Utility Lobbyists Prevail Bill Says Localities Can't Offer Services to Residents, Firms*, Richmond Times-Dispatch, Mar. 14, 1998 (quoting Del. Stump).

[10] Pamela Stallsmith, *Veteran Lobbyist Kept Up the Pace*, Richmond Times-Dispatch, Mar. 22, 1998.

on selling "dark fiber" were so "severe" that the exception was itself a barrier to entry.[11] In fact, not one potential purchaser of "dark fiber" sought to take advantage of the exception.

In the 2002 legislative session, however, the Virginia General Assembly reversed course. By that time, Judge Jones of the U.S. District Court for the Western District of Virginia had ruled that the Virginia barrier-to-entry statute was preempted by section 253(a).[12] More importantly, telecommunications companies had failed to keep the promises they made in return for the bar to local governments. As one newspaper explained, in the years since industry lobbyists convinced the legislature to "block localities from building and operating their own networks . . . [t]ele-communications companies, seeing few economic incentives, have been slow to extend high-speed and high-capacity technology outside of the state's bigger communities."[13]

The 2002 General Assembly passed S.B. 245, enabling local governments in some circumstances to provide telecommunications. 2002 Va. Acts of Assembly, Chap. 479. As its sponsor has explained the new law, the purpose of S.B. 245 was to promote economic development, educational opportunity, enhancement of medical services, and improve quality of life in areas not served or underserved

---

[11] *City of Bristol v. Earley*, 145 F. Supp.2d 741, 745 (W.D. Va. 2001).

[12] *See id.*

[13] Greg Edwards, *Gilmore Offers Tech Plan 'Digital Dominion' Would Unify Approach*, Richmond Times-Dispatch, Sept. 1, 2000.

by advanced communications services. The new legislation was also intended to foster competition where there was no functionally equivalent service, to promote better service at more affordable cost.[14] Among other things, the new law allows Virginia localities with their own electric distribution systems to provide telecommunications services within 75 miles of the boundaries of their electric service areas. Va. Code § 15.2-2160(A).[15]

There was nothing high-minded about the short-lived barrier-to-entry statute in Virginia. It was passed before any telecommunications company had lost a single customer who switched to obtain identical services from a local government. To the contrary, the goal of the local government projects was to provide services, particularly broadband services, that shareholder-owned companies were not providing, and in some places to provide competition for other types of services where there was none in the private sector. After local governments were locked out for four years, and the private sector still was not providing the services that Virginians were demanding, even some of the staunchest defenders of private enterprise in

---

[14] Memorandum of the Honorable William Wampler, Jr., in *Marcus Cable Associates, LLC v. City of Bristol*, Civil Action No. 1:02cv00197 (U.S. District Court for the Western District of Virginia, Dec. 9, 2002).

[15] Of the localities represented in this brief, the towns of Blackstone, Culpeper, Elkton, Franklin, Front Royal, Richlands, and Wakefield, and the Cities of Bedford, Bristol, Danville, Franklin, Harrisonburg, Manassas, Martinsville, Radford, and Salem have electric systems and therefore can claim the benefit of section 15.2-2160. The other locality, Abingdon, is the town located "adjacent to Exit 17" of Interstate 81, and therefore exempt from any bar to providing telecommunications under Va. Code § 15.2-1500(B).

the Virginia legislature were willing to concede that the law needed to be changed for the public good.

3. Freed from the barrier-to-entry statute, local governments in Virginia are bringing competition and advanced services to parts of Virginia where the private industry has failed to act.

Six Virginia localities have filed for and obtained certification as local exchange carriers – Bristol, Martinsville, Danville, Front Royal, Manassas, and Salem. The local governments that are preparing to provide or providing services or testing potential projects are working with cutting-edge technologies, beyond what any private entities are selling to customers in any part of the state. These projects in Virginia disprove the claim that the involvement of local governments could slow the increased availability of new technologies.

In Bristol, Bristol Virginia Utilities is offering businesses and consumers voice, high-speed data, and video services over a fiber-to-the-home (FTTH) network.[16] As Virginia's Center for Innovative Technology explained in its report to the General Assembly on Virginia broadband from last November, "fiber currently offers the best long term, fastest, and most reliable solution."[17] Bristol is one example of why one report concludes: "Forget the RBOCs.

---

[16] *See generally About BVU Optinet*, *at* http://www.bvu-optinet.com/about.htm.

[17] Center for Innovative Technology, Final Report HJ163, *Advancing Affordable, High-Bandwidth Electronic Networks in Rural Virginia* (Nov. 30, 2002), *at* http://www.technology.virginia.gov/SecInfo/legReports/finalReportHJ163_021212.doc.

When it comes to playing a key role in North American fiber-to-the-premises rollouts, municipalities are the stars."[18] After only a few months, the broadband penetration for BVU's service is 14.4%, a figure which matches or exceeds 20 of the top 75 markets in the United States, according to a recent survey.[19]

In Manassas, the City is experimenting with providing Internet services over the power lines. The case of Manassas demonstrates that even communities within commuting distance of large cities may be unserved or underserved by private telecommunications companies. Manassas is within 30 miles of the District of Columbia. Its pilot project brings a 500k Internet connection to home users over their electric lines. In the words of F.C.C. Chairman Powell, the broadband-over-powerline networks that are being tested in Manassas and elsewhere "are a testament to the incredible innovations taking place in broadband network technologies."[20]

In addition, these same localities are participating in regional economic development projects. Virginia's Tobacco

---

[18] Mary Jander, *Grass Roots Fiber Booms*, Light Reading (Oct. 6, 2003), http:// www.lightreading.com/document.asp?site=lightreading&doc_id=41363.

[19] *See* http://www.scarborough.com/scarb2002/press/pr_broadchart.htm (last visited Oct. 9, 2003) (showing 75 cities); Mike Still, *Consultant: BVU's OptiNet Plan on Track*, Bristol Herald-Courier, Aug. 26, 2003 (BVU penetration rate of 14.4%), *available at* http://www.bristolnews.com/servlet/Satellite?pagename=TRI%2FMGArticle%2FTRI_BasicArticle&c=MGArticle&cid=1031770691994&path=/news/localnews&s=1054237353277.

[20] Separate Statement of Chairman Michael Powell, *Re: Inquiry Regarding Carrier Current Systems, including Broadband over Power Line Systems*, ET Docket No. 03-XXX *at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-233537A2.pdf.

Commission exists in part to disburse funds from the National Tobacco settlement for the economic "revitalization" of specific areas in Virginia affected by the decline of the tobacco industry.[21] The Tobacco Commission recently awarded local governments and others over $4 million in grants for telecommunications projects. With funding from the Tobacco Commission, Bristol Virginia Utilities is working with the Cumberland Plateau Planning District Commission to bring new fiber-optic networks for business in Russell and Tazewell Counties.[22]

Similarly, LENOWISCO Planning District Commission is bringing fiber-optic connections to Scott County in rural Southwest Virginia. In some places, LENOWISCO was installing public water lines and fiber-optic data lines at the same time, using the same conduits.[23] Farther to the west, Lee County is still waiting for the next expansion to bring the fiber-optic connections to the westernmost county in Virginia.[24] On the border with Kentucky and West Virginia, Grundy is

---

[21] *See generally* The Virginia Tobacco Indemnification and Community Revitalization Commission, *at* http://www.vatobaccocommission.org/.

[22] Mike Still, *BVU, planning districts get $4.75 million boost to broadband efforts*, Bristol Herald-Courier, Aug. 5, 2003, *at* http://www.bristolnews.com/servlet/Satellite?pagename=TRI%2FMGArticle%2FTRI_BasicArticle&c=MGArticle&cid=1031770358101&path=/frontpage; Charles Owens, *'Fiber-optic backbone' will revolutionize Tazewell, Russell economies*, Bluefield Daily-Telegraph, June 4, 2003, *at* http://www.zwire.com/site/news.cfm?newsid=8206343&BRD=2088&PAG=461&dept_id=346229&rfi=8.

[23] Caron Carlson, *Rural Areas to Get Broadband*, eWeek (June 2, 2003), *at* http://www.eweek.com/article2/0,3959,1114842,00.asp.

[24] Jeff Lester, *Lenowisco Hires Broadband Manager*, Coalfield Progress, Oct. 8, 2003, *available at* http://www.zwire.com/site/news.cfm?newsid=10285473&BRD=1283&PAG=461&dept_id=158544&rfi=8.

working with Virginia Tech on an experimental wireless project, and in the adjacent Dickenson County, the Dickenson County Wireless Internet project is just now getting underway, on a shoestring budget.[25]

In Danville, the economic "turnaround" from an economy based on tobacco and textiles has hinged on the government's decision to take "basic but essential steps" to enable new research industries to develop.[26] Danville is in the approval process for a fiber-optic network for local government needs, which through phased expansion "could eventually function as a platform for an expanded $37 million network that would provide telecommunications services to homes and businesses."[27] Danville's "transformation" has been cited as a "rare example of a community using tobacco settlement money as it was intended."[28]

The role of local governments in the projects funded by the Tobacco Commission highlight the fundamental difference between local governments and other kinds of entities that provide telecommunications services. Economic

---

[25] Kathy Still, *Dickenson County Goes Wireless*, Bristol Herald-Courier, Oct. 14, 2003, *available at* http://www.bristolnews.com/servlet/Satellite?pagename=TRI%2FMGArticle%2FTRI_BasicArticle&c=MGArticle&cid=1031771538662&path=/news/localnews&s=1054237353277; John DeWitt, *The Battle Over Broadband*, American City & County, Apr. 1, 2003, http://www.ecorridors.vt.edu/news/topic/policy/broadbandbattle.shtml.

[26] John Peters, *Rebuilding Danville: Job retraining and research capacity keep this mill town ahead*, Virginia Business, Apr. 2003, at 20.

[27] Victor Reklaitis, *Council*, Danville Register & Bee, Sept. 30, 2003.

[28] Associated Press, *Technology Boom Reaches Virginia County*, (Mar. 31, 2003), *available at* http://www.govtech.net/news/news.phtml?docid=2003.03.31-45307.

development is the primary goal of local government's telecommunications. The Tobacco Commission projects are geared at improving the depressed economies of particular areas of Virginia – the same areas which shareholder-owned companies might view as least likely to be profitable places for new services.

4. The differences between government service providers and private companies support the conclusion that all kinds of "entities" including local government are necessary to achieve the competition and services that Congress intended.

In its amicus brief, Sprint overstates the special advantages to local governments in providing telecommunications services. Just as local governments have assets, incumbent carriers have assets, and competitors seeking to enter the telecommunications market often must rely on the assets of the incumbent carriers, which they are notoriously reluctant to share. Bristol, Virginia, sits adjacent to Bristol, Tennessee; the state line is at the center of the main street of the two cities. When Bristol, Virginia began offering cable television services, the franchise holder cut prices in Virginia but not across the street in Tennessee.[29] Local governments have no advantage to compare with the ability of monopolists to charge

---

[29] Minutes of Bristol Tennessee City Council Meeting (Nov. 5, 2002), *at* http://www.bristoltn.org/Agendas/NOV502-1.doc ("City Manager Tony Massey said that Charter's lowered rates in Bristol, Virginia, but not Bristol, Tennessee, was a source of concern by both Council and citizens.").

more where they have no competition, and use those funds to cross-subsidize their efforts to defeat competition in other areas.

Some complaints about the advantages of local governments have nothing to do with their "government" status. Incumbent carriers are the only ones with the "must-carry" obligations – all competitive local exchange carriers (or "CLECs"), whether public or private, are exempt from this restriction. Incumbent carriers complain inevitably of any advantages the law confers on their competitors. Unlike most CLECs, however, local governments are not trying to resell the use of the networks of private companies – local government projects involve building new networks, to provide different and better services than what the private sector is offering. In fact, local governments provide "open access" to their networks, as in Bristol where another Internet service provider uses the City's network.

The differences between local governments and shareholder-owned companies also explain why local governments are willing to spend money for investments that would never make sense on Wall Street. Most of the Virginia localities participating in this brief have populations of 20,000 or less – government in these locations operates on a first-name basis. The concerns of the voters and rate-payers in the towns and cities of Virginia are jobs and opportunity, and not the rate of return on investment. Local governments must be willing to take a longer view of the future than the investing public might tolerate of shareholder-owned companies, where the stock price and profit margin is scrutinized every day. Market fluctuations and shortages of venture capital heighten this difference, with the result that only local governments with their local priorities and willingness to endure lower rates of

return over longer time frames will make the investment necessary for advanced services in rural areas.

Sprint argues in its amicus brief that government service providers are less efficient. The history of municipal-owned utilities in Virginia and elsewhere is to the contrary; after more than 50 years, municipalities remain providers of electric service precisely because of their ability to provide efficient service. Further, in many cases, these municipal utilities already have the technical expertise in fiber optic and/or advanced digital technology in their work with monitoring and protection systems related to their electric distribution networks. For example, in Danville, the City has constructed, operated and maintained a fiber optic network for five years as part of its Supervisory Control and Data Acquisition ("SCADA") system for utility monitoring and control and to meet intra-municipal communications needs, the City of Bristol began its network serving municipal offices in 1999, and government facilities in the City of Martinsville are connected to the fiber-optic cable of the Martinsville Information Network.

Finally, and most importantly, the common element in all the municipal network projects in Virginia is that local governments are not getting into the business of telecommunications just to steal the customers and profits of companies like Sprint and Verizon. The goals of local government have to do with jobs and the economy. Even if it would be unfair for the law to give a private firm all the purported advantages of local government, local government is not a private firm. It is a different kind of entity, with different priorities, but an entity nonetheless. Protecting the right of local government to provide telecommunications where the private sector fails to serve or

underserves the community is an important way of achieving the specific goals of Congress when it passed the Telecommunications Act.

CONCLUSION

The Virginia localities ask this Court to affirm the decision of the Court of Appeals.

Respectfully submitted,

STEVEN R. MINOR
ELLIOTT LAWSON & POMRENKE
P.O. Box 8400
Bristol, Virginia 24203
Tel: (276) 466-8400
Fax: (276) 466-8161